

DATE: September 22, 1998

CASE NO: 98-ERA-00029

In the Matter of

**MICHAEL WITA**

Complainant

v.

**PUBLIC SERVICE ELECTRIC & GAS CO.**

Respondent

**ORDER APPROVING SETTLEMENT**  
**AND**  
**APPROVING WITHDRAWAL OF COMPLAINT**

This case arises under the employee protection provisions of the Energy Reorganization Act of 1974 (ERA), as amended 42 U.S.C. § 5851 (1988 and Supp. IV 1992). A "Confidential Settlement Agreement and Release" was executed by Complainant and Respondent on August 28 and September 9, 1998, respectively, and was submitted for my review and approval on September 14, 1998. Paragraph 4 of the agreement states that Respondent will pay Complainant a specified amount. Paragraph 5 of the agreement provides protections for Respondent with respect to confidentiality. Paragraphs 2 and 3 of the agreement provide for releases and dismissal of the complaint.

I must determine whether the terms of the agreement are a fair, adequate and reasonable settlement of the complaint. 42 U.S.C. § 5851(b)(2)(A) (1988). Macktal v. Secretary of Labor, 923 F.2d 1150, 1153-54 (5<sup>th</sup> Cir. 1991); Thompson v. U.S. Dept. Of Labor, 885 F.2d 551, 5556 (9<sup>th</sup> Cir. 1989); Fuchko and Yunker v. Georgia Power Co., Case Nos. 89-ERA-9, 89-ERA-10, Sec. Order, Mar. 23, 1989, slip op. at 1-2.

Paragraph 2 of the agreement provides that Complainant releases Respondent from claims arising under the ERA as well as under various other laws. This review is limited to whether the terms of the settlement are a fair, adequate and reasonable settlement of Complainant's allegations that Respondent violated the ERA. Poulos v. Ambassador Fuel Oil Co., Inc., Case No. 86-CAA-1, Sec. Order, Nov. 2, 1987, slip op. at 2.

Paragraph 5 of the agreement contains a confidentiality provision.

The Secretary of Labor has held with respect to confidentiality provisions in settlement agreements that the Freedom of Information Act, 5 U.S.C. §552 (1988) (FOIA) “requires agencies to disclose requested documents unless they are exempt from disclosure...” Coffman v. Alyeska Pipeline Services Co. And Arctic Slope Inspection Services, 96-TSC-5, ARB Case No. 96-141, Final Order Approving Settlement and Dismissing Complaint, June 24, 1996 slip op. at 2-3. See also Plumlee v. Alyeska Pipeline Services Co., Case Nos. 92-TSC-7, 10; 92-WPC-6, 7, 8, 10, Sec. Final Order Approving Settlements and Dismissing Cases with Prejudice, Aug. 6, 1993, slip op. at 6; Davis v. Valley View Ferry Authority, Case No. 93-WPC-1, Sec. Final Order Approving Settlement and Dismissing Complaint, June 28, 1993, slip op. at 2 n.1 (parties’ submissions become part of record and are subject to the FOIA); Ratliff v. Airco Gases, Case No. 93-STA-5, Sec. Final Order Approving Settlement and Dismissing Complaint with Prejudice, June 25, 1993, slip op. at 2 (same).

The records in the instant case are agency records which must be made available for public inspection and copying under the FOIA. In the event a request for inspection and copying of the record is made by a member of the public, that request must be responded to as provided in the FOIA. If an exemption is applicable to the record in this case or any specific document in it, the Department of Labor would determine at the time a request is made whether to exercise its discretion to claim the exemption and withhold the document. If no exemption were applicable, the document would have to be disclosed. Since no FOIA request has been made, it would be premature to determine whether any of the exemptions in the FOIA would be applicable and whether the Department of Labor would exercise its authority to claim such an exemption and withhold the requested information. Further, it would be inappropriate to decide such questions in this proceeding. Department of Labor regulations provide specific procedures for responding to FOIA requests, for appeals by requester from denial of such requests, and for protecting the interests of submitters of confidential commercial information. See 29 C.F.R. Part 70 (1995).

The confidentiality provision in paragraph 5 of the agreement could also constitute a “gag provision” that is unacceptable as being against public policy if it precludes Complainant from communicating with federal or state enforcement agencies concerning alleged violations of law. However, I interpret this paragraph as not preventing Complainant, either voluntarily or pursuant to an order or subpoena, from communicating with, or providing information to, state or federal authorities about suspected violations of law involving Respondent. Therefore, paragraph 5 does not contain an invalid gag provision. Thornton v. Burlington Environmental and Phillip Environmental, 94-TSC-2, Sec. Final Order Approving Settlement and Dismissing Complaint, Mar. 17, 1995. Moreover, in the event that this interpretation is incorrect, any aspect of paragraph 5 that would prohibit Complainant from communicating with

governmental agencies is herewith severed from the agreement, pursuant to paragraph 6(f) which provides for “severability” of invalid provisions.

Cf. Wampler v. Pullman-Higgins Company, 84-ERA-13, Sec. Final Order Disapproving Settlement and Remanding Case, Feb. 14, 1994 (the Secretary rejected severance of the gag provision from the remainder of the settlement despite the respondent’s acquiescence, as the complainant had requested that the provision be “stricken”).

The Secretary requires that all parties requesting settlement approval of cases arising under environmental protection statutes provide the settlement documentation for any other alleged claims arising from the same factual circumstances forming the basis of the federal claim, or to certify that no other such settlement agreements were entered into between the parties. Biddy v. Alyeska Pipeline Service Company, 95-TSC-7, ARB Case Nos. 96-109, 97-015, Final Order Approving Settlement and Dismissing Complaint, Dec. 3, 1996, slip op. at 3. Paragraph 6(g) of the agreement states that the agreement contains the entire agreement between the parties concerning this matter. Accordingly, the parties have certified that the agreement constitutes the entire and only settlement with respect to Complainant’s claims.

### **ORDER**

I find that the agreement, as construed above, is a fair, adequate, and reasonable settlement of the complaint. Accordingly, the agreement is hereby APPROVED.

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RALPH A. ROMANO  
Administrative Law Judge

Camden, New Jersey